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RENEWING THE CALL: IMMIGRANTS' RIGHT TO APPOINTED COUNSEL IN DEPORTATION PROCEEDINGS

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Deportation is a significant deprivation of liberty—both scholars and courts have likened it to criminal punishment. In fact, with the passage of the Illegal Immigrant Reform and Immigration Reform Act in 1996, Congress expanded the grounds for deportation while narrowing the avenues for relief. Moreover, immigration law is notoriously complex, as are the deportation proceedings themselves. These adjudicatory hearings incorporate many of the formal procedural protections adopted by courts of law. Yet non-citizens, who often have little understanding of the American legal system, have no right to appointed counsel. In light of the significant interests at stake, the complexity of the process, and the evolving nature of the law, the right to appointed counsel is necessary to ensure that the dictates of due process are satisfied.

For immigrants facing a deportation hearing, the stakes are high.[1] Deportation could mean being separated from their families and friends and being forced to quit their jobs and to leave their homes. It could mean being sent to a foreign country where unfamiliar faces or even physical harm await them. It could even mean that they will never be able to return to the United States.[2]

Once an immigrant is served with a notice to appear, which informs a non-citizen that deportation proceedings have been initiated, all that stands between him and deportation is the deportation proceeding itself.[3] This hearing is his opportunity to defend himself against the charge that he is deportable or to demonstrate that he is eligible for some form of relief from deportation.[4] However, the deportation proceeding is a confusing and threatening process, particu-

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[1] *See infra* Part II.

[2] *See* Immigration and Nationality Act (INA) § 212(a)(9), 8 U.S.C. 1182 (1998). This Note will use the INA citations since the statutes referred to herein are all found within the INA. *See also infra* note 138 and accompanying text.

[3] *See* INA §§ 239, 240(a). A notice to appear initiates the deportation proceeding against a non-citizen. *See id.* § 239(a). The notice lists the charges against the non-citizen and informs him of the time and place of the proceeding. *See id.*

[4] *See id.* § 240.

larly for a non-citizen, with limited knowledge of immigration law, who is subject to interrogation by an Immigration and Naturalization Service (Service or INS) attorney and the Immigration Judge (IJ), and who is unsure of what evidence to offer and how to meet the legal burdens of proof.[5] Thus, the deportation proceedings fail to adequately protect the significant interests of unrepresented immigrants.

For thirty years, scholars have written about the value of appointed counsel. In his 1975 article, Robert N. Black stated that due process required the government to assign counsel to indigent non-citizens in deportation proceedings.[6] Black employed a due process analysis that balanced the interests of the non-citizen and the non-citizen's ability to represent himself adequately against the weight of the government's interest in not providing counsel.[7] He recognized the "recent evolution of the due process concept"[8] and modeled his analysis on the newly-developed tests utilized by courts to determine if due process required appointed counsel in other government-initiated civil proceedings.[9] He then concluded that due process requires appointed counsel for certain classes of deportation cases[10] because a non-citizen's interests can be so significant that "counsel is needed for the individual to be heard in a meaningful way."[11]

That same year, the United States Court of Appeals for the Sixth Circuit ruled on the issue of appointed counsel for deportees.[12] In *Aguilera-Enriquez v. INS,* the court did not adopt Black's due process analysis.[13] Instead, the court decided that the determination of whether a non-citizen has a due process right to appointed counsel requires a case-by-case analysis.[14] In this particular case, the court found that due process did not require appointed counsel.[15]

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[5] *See infra* Part III.

[6] *See* Robert N. Black, *Due Process and Deportation—Is There a Right to Assigned Counsel?* 8 U.C. DAVIS L. REV. 289, 296–308. Black's conception of the right to appointed counsel is not absolute. *See id.* at 305–08. Certain classes of non-citizens, such as non-immigrants not asserting citizenship or asylum seekers, would not be afforded this right. *See id.* at 305–06.

[7] *See id.* at 299–300.

[8] *Id.* at 308; *see also infra* Part I.

[9] *See* Black, *supra* note 6, at 299–304.

[10] *See id.* at 304.

[11] *Id.* at 304, 308.

[12] *See generally* Aguilera-Enriquez v. INS, 516 F.2d 565 (6th Cir. 1975); *infra* notes 79–83 and accompanying text.

[13] *See Aguilera-Enriquez,* 516 F.2d at 568–69.

[14] *See id.*

[15] *See id.* at 569.

Although the Supreme Court has never addressed the issue specifically, the circuit courts have uniformly applied the case-by-case standard as set out in *Aguilera-Enriquez* and have rejected a per se right to appointed counsel in deportation proceedings.[16] The application of this standard has denied appointed counsel to non-citizens in nearly every case.[17] Nevertheless, scholarship on the topic has continued to argue for extending the right to appointed counsel to non-citizens in deportation proceedings.[18] Generally, these arguments point out that assigned counsel in deportation proceedings is consistent with contemporary notions of procedural due process as set out in *Mathews v. Eldridge*.[19]

Recent amendments to the Immigration and Nationality Act (INA) have made the legal arguments in favor of appointed counsel stronger and of greater importance to those whom it would benefit. In 1996, Congress passed the Illegal Immigrant Reform and Immigration Responsibility Act (IIRIRA).[20] The IIRIRA expanded the grounds for deportation, the bars to relief, and the bars to re-entry.[21] Furthermore, many of these provisions apply retroactively.[22] The increased harshness of these changes to the INA means that non-citizens, particularly immigrants,[23] have increased stakes in the deportation proceeding, and thus an increased need for representation.

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[16] *See infra* note 84.

[17] *See infra* note 85.

[18] *See, e.g.*, David A. Robertson, *An Opportunity to Be Heard: The Right to Counsel in a Deportation Hearing*, 63 WASH L. REV. 1019, 1040 (1988); William L. Dick, Jr., Note, *The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 WM. & MARY L. REV. 627, 628 (1989); Elizabeth Glazer, Note, *The Right to Appointed Counsel in Asylum Proceedings*, 85 COLUM. L. REV. 1157, 1157–58 (1985). Like Black, these authors set limits as to which classes of non-citizens have interests great enough to warrant this protection. *See* Black, *supra* note 6, at 305–08; Robertson, *supra*, at 1050; Dick, *supra*, at 628; Glazer, *supra*, at 1157–58.

[19] *See* Black, *supra* note 6, at 305–08; Robertson, *supra* note 18, at 1050; Dick, *supra* note 18, at 628; Glazer, *supra* note 18, at 1157–58; *see also* 424 U.S. 319, 335 (1976). For a discussion of the Court's holding in *Mathews*, see *infra* notes 147–51 and accompanying text.

[20] Illegal Immigrant Reform and Immigration Responsibility Act, Pub L. No. 104–208, 110 Stat. 3009–546 (1996) (codified in scattered sections of 8 U.S.C) [hereinafter IIRIRA]. Instead of referring to the United States Code citation, throughout this Note, I will cite to the corresponding section of the INA.

[21] *See infra* Part II.B.

[22] *See* INA § 321(c); *infra* notes 135–37 and accompanying text.

[23] In general, non-citizens (any person who is not a citizen or national of the United States) can be divided into two categories: immigrants and non-immigrants. *See* INA § 101(a)(15). Immigrants are defined negatively in the INA: all non-citizens who do not fit into one of the specified non-immigrant categories are immigrants. *See id.* Non-immigrants are usually allowed to enter the United States for only a limited amount of time and for a

This Note demonstrates that the arguments in favor of a per se right to appointed counsel for immigrants in deportation proceedings are even more persuasive today than they have been in the past.[24] Part I describes the development of due process rights, particularly with regard to counsel, for non-citizens whom the Service has placed in deportation proceedings. This part focuses on the influence of developments in other fields of law on the current status of appointed counsel in deportation.

Parts II and III employ the *Mathews* balancing test[25]—the Supreme Court's weighing of interests to determine what procedural protections are required by due process—to demonstrate that the absence of counsel in deportation proceedings results in a hearing that is fundamentally unfair. Part II analyzes the immigrant's liberty interests at stake in deportation, focusing on how changes to the INA made by the IIRIRA have affected these interests. Part III argues that the existing procedures fail to protect against erroneous deprivations of liberty. This is due in part to the complexity of immigration law and procedures, but also to the adversarial nature of the proceeding and to the Immigration Judges' precarious role as both adjudicator and inquisitor. Furthermore, Part III shows that changes to the INA, though limiting the defenses available to non-citizens and removing

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specific reason. *See, e.g., id.* § 101(a)(15)(B), (K). For example, non-immigrants can come to the United States to attend school, to conduct business, or to visit relatives. *See id.* § 101(a)(15)(B), (F).

Immigrants, however, generally intend to remain in the United States. *See id.* § 201(a). Upon admission, most immigrants attain the status of legal permanent resident (LPR), are able to work, and are eligible for some government benefits. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 99 (2d ed. 1997). In 1998, 660, 477 immigrants were admitted to the United States. *See* Office of Policy and Planning, Statistics Branch, Immigration and Naturalization Service, U.S. Dept. of Justice, No. 2, *Legal Immigration, Fiscal Year 1998,* at 7 (May 1999) [hereinafter *Legal Immigration*]. Of this number, 72% were family-sponsored immigrants (family preference immigrants and immediate relative immigrants). *See id.* They were admitted to the United States because they have relatives who are citizens or LPRs. *See* INA §§ 203(a), 204(a), (c), (f), (g), (h). About 8% of the immigrants were refugees, almost 12% came because of an employment offer, and about 7% came as part of a diversity program. *See Legal Immigration, supra,* at 7.

[24] The 1996 changes to the INA abolished the term "deportation proceedings." *See* LEGOMSKY, *supra* note 23, at 534. The term "removal proceedings" was added to encompass both deportation and exclusion (now called "inadmissibility"). *See id.* Removal proceedings adjudicate non-citizens whom the Service wants to remove either because they are deportable or because they are inadmissible. *See id.* However, for purposes of this article, I will use the terms "deportation" and "deportation proceedings" in order to distinguish between the removal of non-citizens because they are deportable and the removal of non-citizens because they are inadmissible.

[25] *See* 424 U.S. 319, 335 (1976).

some of the IJ's discretion, in fact actually increase the need for counsel. This Note concludes that in light of immigrants' strong interests in remaining in the United States and the potential for erroneously depriving them of that interest, the case-by-case approach to determining if counsel must be appointed fails to meet the dictates of due process.

I. DEVELOPMENT OF THE CASE-BY-CASE APPROACH

Regardless of the judiciary's recognition of the penal and quasi-criminal nature of deportation,[26] the Supreme Court has held repeatedly that deportation proceedings are civil rather than criminal in nature.[27] This distinction is important because the constitutional protections afforded criminal defendants, including the Sixth Amendment right to counsel, are, therefore, not available to non-citizens in deportation proceedings.[28]

Nevertheless, non-citizens in deportation proceedings do have some constitutional protections. The courts have differentiated between Congress' authority to dictate *conditions* for non-citizens residing in the United States and Congress' prescribing *procedure* for enforcing and adjudicating these conditions.[29] With regard to the former power, non-citizens are "subject to the power of Congress to expel them, or order them to be removed and deported from the country, whenever, in its judgment, their removal is necessary or expedient for the public interest."[30] This virtually unreviewable power to establish conditions for non-citizens consistently has been reaffirmed by the Supreme Court.[31]

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[26] *See infra* note 90.

[27] *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984); Bridges v. Wixon, 326 U.S. 135, 154 (1945).

[28] *See* U.S. CONST. amend. VI. *See also, e.g.*, Galvan v. Press 347 U.S. 522, 531 (1954) (prohibition against ex-post facto laws not applicable). However, even in the case of retroactive legislation, which has long been accepted in the civil context, due process arguments have been made against their applicability in deportation proceedings. *See* Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 97 (1998). Although Morawetz acknowledges that the legislature can proscribe retroactive immigration laws, she suggests that recent retroactive legislation, particularly with regard to aggravated felons, is not justifiable and violates due process. *See id.* at 97–98, 100.

[29] *See* Yamataya v. Fisher, 189 U.S. 86, 100–01 (1903).

[30] Fong Yue Ting v. United States, 149 U.S. 698, 724 (1893); *see* Chae Chan Ping v. United States, 130 U.S. 581, 603–04 (finding that political branch has exclusive control of sovereign power to regulate immigration).

[31] *See, e.g.*, Harisiades v. Shaughnessy, 342 US 580, 588–90 (1952).

Congress, however, is limited in its authority to dictate the procedure for enforcing immigration laws. In 1903, the Supreme Court recognized a non-citizen's Fifth Amendment right to procedural due process in deportation proceedings.[32] In *Yamataya v. Fisher* ("The Japanese Immigrant Case"), the Court stated that "this [Supreme Court] has never held that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."[33] In principle, the Court's commitment to the Fifth Amendment was strong and explicit, but in practice, the due process rhetoric has proven hollow.[34] Even in *Yamataya,* where the Court acknowledged that a non-citizen must be given the opportunity to be heard prior to determining that he is deportable, the protection afforded the non-citizen was minimal.[35] For example, due process did not require an interpreter for the non-citizen; thus, in effect, the opportunity to be heard was granted only to those who understood and spoke English.[36]

With a few exceptions,[37] *Yamataya's* due process rhetoric continued to lack substance for the next fifty years.[38] However, as pointed out by immigration lawyer Charles Gordon in 1961, "due process is an expanding concept which reflects current notions of fairness."[39] Changing notions of fairness were reflected in the Immigration and

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However, even with regard to issues that are clearly substantive in nature, there are some narrow limitations to Congress' power. For example, in *Francis v. INS,* the court entertained an equal protection challenge to a provision that offered relief to certain classes of non-citizens while denying it to others. *See* 532 F.2d 268, 272 (2d Cir. 1976). Using a minimum scrutiny standard, the court found that the standards for eligibility were not fair and not substantially related to the object of the legislation. *See id.* at 272–73.

Furthermore, Hiroshi Motomura argues that the development of due process protections available to immigrants has effectively brought substantive due process into immigration law as well. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights,* 92 COLUM. L. REV. 1625, 1656–1704 (1992).

[32] *See Yamataya,* 189 U.S. at 100.

[33] *Id.*

[34] *See id.* 100–02.

[35] *See id.* at 101–02.

[36] *See id.*

[37] There were several cases that did in fact look at the entire procedure to determine if the non-citizen had been afforded due process. *See, e.g.,* Whitfield v. Hanges, 222 F. 745, 749 (8th Cir. 1915); *Ex Parte* Chin Loy You, 223 F. 833, 837–39 (D. Mass. 1915).

[38] *See* Motomura, *supra* note 31, at 1638–44; David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond,* 44 U. PITT. L. REV. 165, 174–75 (1983).

[39] Charles Gordon, *Right to Counsel in Immigration Proceedings,* 45 MINN. L. REV. 875, 879 (1961).

Nationality Act of 1952.[40] The new statutory procedures replaced the loose procedural protections previously required by the Constitution.[41] Among the protections provided in the statute, an alien in deportation proceedings had a right to an attorney "at no expense to the government."[42]

The legal climate of the 1960s made possible challenges to the constitutionality of the provision "at no expense to the government" through arguments that due process required assignment of counsel to indigent non-citizens. In 1963, the Supreme Court established a right to appointed counsel in criminal cases in *Gideon v. Wainwright*.[43] Adopting language from a prior case involving the right to counsel in criminal cases, the Supreme Court in *Gideon* stated:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad.
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> . . . .
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> He lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[44]

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[40] *See* Immigration and Naturalization Act, Pub. L. No. 82–414, 66 Stat. 163, § 242 (1952).

[41] *See id.* §§ 242, 292. However, there were increased procedural protections after 1950 when the Supreme Court decided *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), which held that the Administrative Procedures Act (APA) was applicable to deportation proceedings. *See* Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 INTERPRETER RELEASES 453, 456, May 2, 1998. Congress subsequently exempted the Service from having to conform with the APA. *See id.* at 457.

[42] Currently, this provision states: "the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings[.]" INA § 240(b)(4)(A).

[43] *See* 372 U.S. 335, 342, 345 (1963). The Court agreed with the defendant that the appointment of counsel is a fundamental right essential to a fair trial. *See id.* at 344–45 (overruling Betts v. Brady, 316 US 455 (1942)). Therefore, the Sixth Amendment guarantee of counsel for indigent defendants was extended to the states via the Fourteenth Amendment. *See id.* at 342.

[44] Gideon, 372 U.S. at 344–45 (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).

Although the Sixth Amendment did not apply to deportation proceedings, the reasoning adopted by the Supreme Court in *Gideon* lends support to a right to appointed counsel under the Fifth Amendment since both Amendments encompass underlying concerns about fairness.[45]

More importantly, in 1967, the right to appointed counsel made its way into the civil context.[46] In *In re Gault,* the Supreme Court recognized a juvenile's due process right to appointed counsel in delinquency proceedings.[47] In its opinion, the Court focused on the characteristics of the proceeding rather than its label as "civil" or "administrative."[48] Regardless of the juvenile justice system's attempts to make the delinquency proceedings less adversarial than an adult criminal trial and more focused on the welfare of the child, in *Gault,* the Court recognized that the consequences of a delinquency hearing would be essentially the same as in a criminal trial.[49] The fact that the juvenile's physical liberty was at stake was integral in the Court's decision.[50]

In contrast to *Gault,* the Court has been less willing to recognize an absolute right to appointed counsel where the deprivation of liberty is non-physical.[51] For example, in *Lassiter v. Department of Social Services,* the Court rejected the argument that due process required appointed counsel for indigent parents in proceedings to terminate their parental rights.[52]

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[45] *See* William Haney, *Deportation and the Right to Counsel,* 11 HARV. INT'L L.J. 177, 184–85 (1970).

[46] *See In re* Gault, 387 U.S. 1, 41–42 (1967); *see also* Robert S. Catz & Nancy Lee Frank, *The Right to Appointed Counsel in Quasi-Criminal Cases: Towards an Effective Assistance of Counsel Standard,* 19 HARV. C.R.-C.L. L. REV. 397, 410 (1984). Interestingly, around this same time, the Supreme Court was also expanding the protections afforded criminal defendants beyond the right to counsel. *See, e.g.,* Miranda v. Arizona, 384 U.S. 436, 467–68 (1966).

[47] *In re Gault,* 387 U.S. at 41. Like deportation proceedings, delinquency proceedings are civil, not criminal, hearings. *See supra* note 28; Catz & Frank, *supra* note 46, at 399–400. Some commentators refer to these proceedings as "quasi-criminal." *See id.*

[48] *See In re Gault,* at 38–42; Catz & Frank, *supra* note 46, at 410.

[49] *See* Catz & Frank, *supra* note 46, at 410; Haney, *supra* note 45, at 184–85.

[50] *See* Catz & Frank, *supra* note 46, at 410; Haney, *supra* note 45, at 184–85.

A year later, in *Heryford v. Parker,* the Tenth Circuit extended *In re Gault* to civil commitments. *See* 396 F.2d 393, 396 (10th Cir. 1968). Like in *In re Gault,* the court focused on the fact that physical liberty was at stake. *See id.*; *In re Gault,* 387 U.S. at 41. That the deprivation of freedom was necessary to administer treatment rather than punish the individual did not matter. *See Heryford,* 396 F.2d at 396; Catz & Frank, *supra* note 46, at 411.

[51] *See* Catz & Frank, *supra* note 46, at 415.

[52] 452 U.S. 18 (1981). The right to appointed counsel diminished as the liberty interest diminished. *See id.* at 26; *see also* Catz & Frank, *supra* note 46, at 417.

Prior to *Gault,* there had been attempts to argue that non-citizens in deportation proceedings were entitled to appointed counsel.[53] However, courts generally declined to decide the issue of whether due process required appointed counsel. Instead, they found that the absence of counsel was not prejudicial in those cases.[54] After 1967, however, academia encouraged courts to apply the "intellectual framework" of *Gault* to determine if counsel should be provided in deportation proceedings.[55] A parallel argument was drawn between the deprivation of liberty at stake in a juvenile delinquency hearing and the deprivation of liberty at stake in a deportation hearing.[56] It was argued that

> The consequences of deportation are often fully as grave as those of imprisonment; deportation has at times had the effect of wrenching a person from his home since childhood, separating him from his wife and children, who may be American citizens, and sending him to a strange land or, even worse, leaving him with no country at all to which to turn.[57]

However, when the Sixth Circuit rendered its decision in *Aguilera-Enriquez,* rather than relying on *Gault,* the court looked to *Gagnon v. Scarpelli*[58] and its predecessor, *Morrissey v. Brewer,*[59] for guidance.[60] *Gagnon,* a post-Warren decision handed down in 1973, was a case in which the petitioner, John Gagnon, had had his probation revoked without a hearing.[61] On *habeas* review, the Supreme Court held that a probation revocation, like a parole revocation, is not a criminal proceeding; nonetheless, it does result in a deprivation of liberty, and thus entitles

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[53] *See, e.g.,* De Bernardo v. Rogers, 254 F.2d 81, 82 (D.C. Cir. 1958); *In re* Raimondi, 126 F. Supp. 390, 391, 395 (N.D. Cal. 1954).

[54] *See, e.g., De Bernardo,* 254 F.2d at 82; *Raimondi,* 126 F. Supp. at 395. In *Henriques v. INS,* the court rejected the petitioner's claim that he was entitled to appointed counsel, reasoning that counsel would not have been able to obtain a different outcome for the petitioner in the deportation proceeding. 465 F.2d 119, 120 (2d Cir. 1972). However, the court declined to address the issue of whether counsel would be required in certain cases calling that a "grave" question that would best be left for another time. *See id.* at 121.

[55] *See* Haney, *supra* note 45, at 184.

[56] *See id.* at 185.

[57] *See id.* (citing Harisiades v. Shaughnessy, 342 U.S. 580 (1952) and Shaughnessy v. U.S. ex rel. Mezei, 345 U.S. 206 (1953)).

[58] 411 U.S. 778 (1973).

[59] 408 U.S. 471 (1972).

[60] *See* Aguilera-Enriquez v. INS, 516 F.2d 565, 568 & n.3 (6th Cir. 1965).

[61] *See* Gagnon v. Scarpelli, 411 U.S. 778, 780 (1973).

a probationer to due process.[62] Due process entitles a probationer to a hearing before his probation is revoked.[63]

More importantly, in *Gagnon,* the Court addressed the issue of whether the government was obligated to appoint counsel to represent probationers in revocation hearings.[64] Instead of adopting a per se rule akin to the right to appointed counsel in criminal proceedings[65] or in juvenile delinquency hearings,[66] the Court adopted a "case by case" approach.[67] Essentially, under this approach, the court would consider the peculiarities of a particular case to determine if counsel was necessary.[68]

In adopting this approach, the Court reasoned that the "nature" of the revocation proceeding would be significantly, and detrimentally, altered if counsel were provided for the probationer.[69] Probation revocation hearings are informal and flexible—the technical rules of procedure and evidence do not apply.[70] Furthermore, the State is represented by a probation officer, not a prosecutor.[71] The probation officer, while not wanting to compromise public safety, is responsible for furthering the rehabilitative goals of the probation system.[72] The Court feared that the introduction of counsel into the revocation proceeding might prevent the hearing body from staying "attuned to the rehabilitative needs of the individual probationer. . . ."[73] The Court was concerned that this relatively non-adversarial proceeding would become unnecessarily adversarial and lose the benefits of informality and flexibility.[74]

Although the Court did seem concerned with the probationer's best interest, the decision in *Gagnon* gave little weight to the liberty

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[62] *See id.* at 782. Gagnon had pleaded guilty to armed robbery and was placed on probation for seven years. *See id.* at 779.

[63] *See id.* at 782–83, 790; Morrissey v. Brewer, 408 U.S. 471, 480–82 (1972).

[64] *See Gagnon,* 411 U.S. at 787–90.

[65] *See generally, e.g.,* Gideon v. Wainwright, 372 U.S. 335 (1963).

[66] *See In re* Gault, 387 U.S. 1, 41 (1967).

[67] *See Gagnon,* 411 U.S. at 788–89. In doing so, the Court adopted an approach similar to that of the right to counsel in felony prosecutions in *Betts v. Brady,* 316 U.S. 455 (1942). *See id.* The court acknowledged the fact that this approach was rejected in *Gideon,* but maintained that the differences between criminal trials and probation revocation hearings was substantial enough that the case-by-case approach is not necessarily inadequate. *See id.*

[68] *See id.* at 789.

[69] *See id.* at 787–88.

[70] *See id.* at 789

[71] *See id.*

[72] *See Gagnon,* 411 U.S. at 787–89.

[73] *See id.* at 787–88.

[74] *See id.*; *see also* Black, *supra* note 6, at 295.

interests at stake in probation revocation hearings.[75] Several states have recognized a right to appointed counsel in probation revocation proceedings in their own criminal justice systems.[76] The Massachusetts courts, for example, have held that counsel is necessary in a probation revocation hearing because of the liberty interest at stake.[77] In 1966, the highest court in Massachusetts explained the link between the right to appointed counsel and this liberty interest:

> The defendant's liberty is at stake, and at this point in the process of sentencing as much as at any other point he has need of counsel. In this case the decision on the petitioner's liberty is still in the hands of the sentencing court. . . . [I]n the absence of a waiver [the probationer must] be afforded counsel at a probation revocation hearing where such revocation might result in imprisonment. It is based on simple justice.[78]

Nonetheless, quoting from *Gagnon,* the *Aguilera-Enriquez* court held that "[t]he test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide 'fundamental fairness, the touchstone of due process.'"[79] The court went on to assess the merits of the petitioner's case.[80] The petitioner was deportable because he had been convicted of a narcotics offense.[81] Looking to the record established before the Immigration Judge, the court concluded that the petitioner had raised no defense to the charge that he was deportable.[82] Consequently, the court found that "counsel

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[75] *See generally Gagnon,* 411 U.S. 778.

[76] *See, e.g.,* Williams v. Commonwealth, 216 N.E.2d 779, 782–83 (1966). In addition to Massachusetts, states that recognize the right to the assistance of counsel at a probation revocation hearing include: Arizona, California, Florida, Idaho, Illinois, Indiana, Maryland, Michigan, Missouri, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, and Texas. *See* 44 A.L.R. 3d 306, § 4(a) (Supp. 1998).

[77] *See Williams,* 216 N.E.2d at 782–83; *see also* Commonwealth v. Faulkner, 638 N.E.2d. 1, 5 (1994) (reaffirming the holding in *Williams*).

[78] *Williams,* 216 N.E.2d at 782–83.

[79] Aguilera-Enriquez v. INS, 516 F.2d 565, 568 (6th Cir. 1975) (quoting *Gagnon,* 411 U.S. at 790).

[80] *See id.* at 569.

[81] *See id.*

[82] *See id.* It is important to note the procedural history of this case. The petitioner had requested counsel at his administrative hearing before an Immigration Judge. *See id.* at 567. The IJ refused his request, and the petitioner was ordered deported. *See id.* The petitioner appealed the IJ's decision to the Board of Immigration Appeals. *See id.* at 568. The Board dismissed his appeal and the petitioner then sought review in the federal court. *See*

could have obtained no different administrative result" and, thus, rejected the petitioner's claim that he was denied due process.[83]

Cases subsequent to *Aguilera-Enriquez* have followed the Sixth Circuit.[84] Like the *Aguilera-Enriquez* court, other circuits are generally quick to find that a non-citizen's lack of representation was not prejudicial to the outcome.[85] In practice, the case-by-case approach has essentially resulted in across-the-board denials of appointed counsel.

I. The Liberty Interest

Less than two years after the *Aguilera-Enriquez* court cited fundamental fairness as the touchstone of due process,[86] the Supreme Court adopted explicit guidelines for determining what constitutes fundamental fairness.[87] In *Mathews v. Eldridge,* the Court held that:

> the specific dictates of due process generally requires [sic] consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[88]

In applying the *Mathews* balancing test to the question of whether appointed counsel for immigrants in deportation proceedings is required, it is necessary to identify each of the three factors set out

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id. The only issue before the Sixth Circuit was whether the petitioner had a constitutionally protected right to appointed counsel. *See id.*

[83] *See id.* at 569.

[84] *See, e.g.*, Cyrulik v. INS, NO. 92–70183, 1993 WL 98817, at *3 (9th Cir. Apr. 2, 1993) (unpublished opinion) ("Cyrulik has failed to show how counsel's assistance in eliciting Cyrulik's full testimony or cross-examining certain documents would have altered the outcome of the hearing."); Michelson v. INS, 897 F.2d 465, 468 (10th Cir. 1990) ("[P]etitioner's complaint concerning the lack of appointed counsel does not provide a valid ground for challenging the order of deportation because he has not shown prejudice which would cast doubt on the fundamental fairness of the proceeding.").

[85] *See Cyrulik,* 1993 WL 98817, at *3; *Michelson,* 897 F.2d at 468. *But see* Rios-Berrios v. INS, 776 F.2d 859, 863 (9th Cir. 1985) (finding "serious doubts" as to voluntariness of defendant's waiver of voluntary departure and holding that it was "convinced that his asylum case [would] be more advantageously presented by retained counsel").

[86] *See* 516 F.2d at 568.

[87] *See* Mathews v. Eldridge, 424 U.S. 313, 335 (1976).

[88] *Id.*

above and balance each one's strengths in relation to the others.[89] This Part will analyze the first factor: the effect of the government's action of deportation on the immigrant's private interests.

A. *Deportation as Banishment, Exile, and Worse*

Scholars and courts have recognized the gravity of deportation, and likened it to criminal punishment.[90] In defining the private interest at stake in deportation proceedings, consideration of these grave consequences is necessary.[91] For many long-time legal permanent residents, returning to their home country is like sending them to live in a foreign country. Many immigrants come to the United States as children,[92] and some may not remember living in any other country; others simply have not returned to their native country for many years. Friends and family often live in the United States, and immigrants' familial ties to their homeland may be minimal.[93]

Some immigrants find that deportation is not only analogous to criminal punishment, but that in fact, it will result in physical harm to them.[94] Immigrants who are refugees[95] may be killed, imprisoned or forced to suffer another form of persecution if they are deported.[96]

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[89] *See id.*

[90] *See, e.g.*, Gastelum-Quinones v. Kennedy 374 U.S. 469, 479 (1963) ("deportation is a drastic sanction, one which can destroy lives and disrupt families"); Tan v. Phelan, 333 U.S. 6, 10 (1948) ("deportation is a drastic measure and at times the equivalent of banishment of [sic] exile"); Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted."); Morawetz, *supra* note 28, at 102. Morawetz goes so far as calling on the courts to "wipe the slate clean and admit to the long evident reality that deportation is punishment." *See id.*

[91] *See* Black, *supra* note 6, at 300–01; Glazer, *supra* note 18, at 1179–80.

[92] In 1998, 129,291 immigrants—about 20% of the total admitted to the country that year—were under 15 years old. *See Legal Immigration, supra* note 23, at 10.

[93] More than two-thirds of all immigrants admitted to the United States in 1998 were family-sponsored. *See Legal Immigration, supra* note 23, at 7. Furthermore, any child born in the United States is a U.S. citizen regardless of his parent's citizenship. *See* INA § 301(a).

[94] *See* INA § 101(a)(42). Refugees come to the United States because of persecution in their native country. *See id.*; *see also infra* note 96.

[95] The term "refugee" incorporates two groups: refugees, those who make claims from outside of the United States, and asylees, those who make claims once in the United States. *See* INA §§ 101(a)(42), 207(c), and 208(b)(1).

[96] *See* Glazer, *supra* note 18, at 1179–80. Refugees are admitted to the United States because they either have been persecuted or have a well-founded fear of being persecuted on one of five grounds specified. *See* INA § 101(a)(42). To qualify as a refugee, the non-citizen must show that the persecution or well-founded fear of persecution was on account of his race, religion, nationality, membership in a particular social group, or political opinion. *See*

Furthermore, because the statutory grounds for asylum are narrow—not all persecuted persons are eligible for asylum—many non-citizens who would face persecution upon return to their native country may have emigrated to the United States without seeking asylum.[97]

Regardless of whether the immigrant is a long-time resident or he fears persecution upon return to his country of origin, he has an interest in remaining in the United States. Immigrants by their very nature have a significant private interest; they have left their homes, moved to a foreign country, and started anew with an intent to remain in the United States.[98] As one commentator has pointed out, "[l]awful permanent resident aliens occupy the circle of membership [in society] just outside that of citizens, and resident aliens have developed a substantial stake in the community in justifiable reliance on their continued rights in this society."[99] Consequently, even those immigrants with relatively few quantifiable private interests at stake still face significant deprivations if they are deported.[100]

Congress, recognizing the private interests at stake in deportation proceedings, has passed legislation that renders some immigrants statutorily eligible for relief from deportation.[101] Historically, the relief

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id. There are several statutory bars to asylum including participation in persecution, the commission of a serious non-political crime outside of the United States, and the conviction for a serious crime inside the United States. *See* INA § 208(a)–(b).

[97] *See supra* note 96.

[98] *See supra* note 23. Although immigrants, unlike non-immigrants, may remain in the United States permanently, they may be deported if they fall within the grounds for deportability. *See* INA § 237(a). For immigrants, the greatest concern is that they will be found deportable on criminal- or security-related grounds which include: the conviction of one crime of moral turpitude committed within five years after the date of admission and for which a sentence of one year or longer may be imposed; the conviction of two crimes of moral turpitude; the conviction of an aggravated felony; the conviction of a crime related to high-speed flight from an immigration checkpoint; the conviction under a law relating to a controlled substance; the conviction of firearm offense; the conviction of a crime of domestic violence; stalking; or child abuse, neglect, or abandonment; and the violation of a protection order. *See* INA § 237(a)(2) (scattered sections).

In addition, an immigrant is deportable if he was a drug abuser or addict, committed document fraud or marriage fraud, voted unlawfully, became a public charge, failed to properly register under non-citizen registration laws, smuggled a non-citizen into the United States, or was inadmissible when he entered the country. *See id.* § 237(a)(1), (2), (3), (5). An immigrant who leaves the United States might also be subject to the grounds of inadmissibility. *See* INA §§ 101(a)(13), 212(a).

[99] Martin, *supra* note 38, at 210.

[100] *See id.*

[101] *See* Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 281–82 (1997).

After the Immigration Judge has determined that the alien is deportable, he will consider the various forms of relief for which the non-citizen is eligible. *See id.* at 284–85.

available to immigrants takes into consideration the factors described above, such as the length of the immigrant's residency and his ties to the United States.[102] Thus, in the past, statutory relief has allowed for the equities of the situation to affect the outcome of a deportation proceeding.[103]

For example, "Cancellation of Removal A," previously § 212(c) "Waiver of Deportability," gives an Immigration Judge authority to cancel deportation for immigrants who have been lawful permanent residents for five years and have lived in the United States for seven years.[104] Immigrants who have not attained five years of LPR status may be eligible for "Cancellation of Removal B,"[105] previously called "Hardship Waiver." To qualify for this relief, a non-citizen must show "that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."[106] Although meeting this high standard is difficult,[107] it does

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These forms of relief—which are affirmative defenses, as the non-citizen has the burden of proving eligibility—are discretionary. *See id.*

[102] *See* Robertson, *supra* note 18, at 1035.

[103] *See* Morawetz, *supra* note 28, at 110.

Prof. Morawetz points out that with regard to the § 212(c) waiver for criminal activity:

> [t]he award of the a waiver depended not only on the nature of the criminal conduct, but also on the immigrant's life after committing the crime. . . . . This waiver process protected the interests of the immigrant who may have built a life of work, family and community based on the understanding that his or her past conviction would not lead to deportation. It also protected the interests of all of those whose lives were intertwined with that of the immigrant, including family members, employers and the employees of immigrants who operated businesses.

Id. at 110–11. Although the immigrant's stake in remaining in the United States is taken into consideration, it is not dispositive. *See id.* The Immigration Judge also weighs the gravity of the crime and the non-citizen's rehabilitative efforts. *See id.*

[104] *See* INA § 240A(a). The seven years only begin to accrue after the non-citizen has been admitted. *See id.* Admitted means that he must have entered after inspection and authorization by an immigration officer. *See id.* § 101(a)(13). In addition, the immigrant must not have been convicted of an aggravated felony to be statutorily eligible. *See id.* § 240A(a).

[105] *See* INA § 240A(b)(1)(D)

[106] *See id.* The applicant for this relief must also show that he was physically present for 10 years, has good moral character, and was not convicted on various criminal grounds. *See id.* Cancellation of removal is available to non-immigrants as well as permanent residents. *See id.* In addition, there are special rules, which are more lenient, for battered spouses and children. *See id.* § 240A(b)(2)

[107] *See, e.g.*, In re Pilch, 1996 BIA LEXIS 37, *7–13 (BIA 1996); Matter of Anderson, 16 I&N Dec. 596 (BIA 1978). Although both of these cases dealt with earlier versions of this

offer relief to some non-citizens who can demonstrate that their ties to the United States are significant.

In addition to Cancellation of Removal A and B, an immigrant may seek relief through asylum.[108] Although a non-citizen may seek asylum upon entry to the United States, it is also a form of relief available to him in a deportation proceeding.[109] Thus, an Immigration Judge has the authority to take into consideration the potential danger awaiting an immigrant who may be forced to return to his native country.[110]

B. *Changes to the INA and Their Effects on an Immigrant's Liberty Interest*

It has been argued that an immigrant's liberty interest is proportional to his eligibility for relief since, as more relief becomes available, meeting evidentiary burdens becomes more difficult.[111] While it is true that counsel is needed to help establish eligibility for relief, this reasoning assumes the outcome from the outset of the hearing.[112] In defining the liberty interest by looking at the relief available to the immigrant rather than at the potential deprivation if he were deported, one must presuppose that he knows what counsel, after thorough research and investigation, would argue.[113] In fact, counsel is

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form of relief where the standard "exceptional and extremely unusual hardship" was lower, they do offer some guidance as to how this standard is interpreted. *See id.*

[108] *See supra* note 94–96. A form of relief similar to asylum is withholding of removal (also known as nonreturn or *nonrefoulement*). *See* 241(b)(3); *see also* Sarah Ignatius, *Asylum Law and Procedure, in* UNDERSTANDING THE NEW IMMIGRATION LAW: HOW THE LAW AFFECTS IMMIGRANTS AND ASYLUM SEEKERS 147, 148–49 (Iris D. Gomez et al. eds., 1997). Withholding of removal prevents a non-citizen from being deported to a country where he fears that his life or freedom would be threatened. *See* INA § 241(b)(3)(A); Ignatius, *supra,* at 148. Like asylum, the fear must be on account of one of the five specified grounds. *See id.* Although the standard of proof is higher than for asylum, if the non-citizen is statutorily eligible, withholding, unlike asylum, is mandatory. *See* Ignatius, *supra,* at 149.

[109] *See* DEBORAH E. ANKER, THE LAW OF ASYLUM IN THE UNITED STATES: A GUIDE TO ADMINISTRATIVE PRACTICE AND CASE LAW, 53–54 (2d ed. 1991).

[110] *See supra* notes 95–97. In addition, the IJ may grant other forms of relief such as voluntary departure which allows an immigrant to leave the United States voluntarily in lieu of an order of deportation. *See* INA § 240B.

[111] *See* Robertson, *supra* note 18, at 1035–36; Black, *supra* note 6, at 307.

[112] *See* Robertson, *supra* note 18, at 1035–36; *see also* Black, *supra* note 6, at 307. Black, in his argument for appointed counsel, argues that "the deportation respondent who presents a colorable defense to the charge of deportability would be provided with counsel. . . ." Black, *supra* note 6, at 307. He goes on to argue that, similarly, "the respondent would be entitled to the assistance of counsel if he could assert a colorable claim to the various forms of discretionary relief provided." *Id.*

[113] *See* Aguilera-Enriquez v. INS, 516 F.2d 565, 573 (6th Cir. 1975) (DeMascio, J., dissenting). In the dissent, Judge DeMascio criticizes the case-by-case approach for determin-

needed to assist the client in determining which forms of relief may be available to him.[114] Furthermore, if liberty interests are defined by the relief available to the immigrant rather than by the consequences of deportation, then recent changes to the INA made by the IIRIRA eliminating previously available forms of relief would have decreased immigrants' liberty interests.[115]

Instead, the opposite has resulted: immigrants' liberty interests and their need for appointed counsel have increased. The IIRIRA reflected Congress' concern that the current laws were too lenient with regard to criminal aliens.[116] Whereas non-immigrants can be deported for various violations of their non-immigrant status,[117] immigrants, who have far fewer conditions placed on them, are subject primarily to criminal grounds of deportation.[118] Consequently, the changes made by the IIRIRA to the criminal grounds of deportation substantially affect immigrants' liberty interests.

Many immigrants have been affected by the IIRIRA's replacement of § 212(c) waivers with "Cancellation of Removal."[119] With the name change came substantive changes to the statutory eligibility for this form of relief.[120] Section 212(c) barred relief for those immigrants who had committed an aggravated felony *and* who had served a sentence of five years.[121] In contrast, "Cancellation of Removal A" places a bar on *all* aggravated felons, regardless of the length of time—if any—they serve in prison.[122]

Although Congress clearly intended to take a "tough" stance on crime by removing some of the IJ's discretion to grant relief to many criminal immigrants,[123] the changes made to the INA will produce exceptionally harsh results. Many immigrants who are convicted of

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ing whether appointed counsel is necessary because it requires the court to speculate as to what arguments counsel would have made before the Immigration Judge. *See id.*

[114] *See id.*; *see also infra* notes 250–51 and accompanying text.

[115] *See generally infra* notes 120–146 and accompanying text.

[116] *See* IIRIRA, Pub. L. No. 104–208, 110 Stat. 3009–546, Title III, Subtitle B (Criminal Alien Provisions) (1996).

[117] For example, non-immigrant visas generally allow the non-citizen to remain in the United States for a specified amount of time. *See* INA § 101(a)(15). A non-immigrant will be deportable if he overstays his visa. *See id.* § 237(a)(1)(C)(i).

[118] *See generally id.* § 237(a).

[119] *See id.* § 240A(a).

[120] *See id.*

[121] *See* Morawetz, *supra* note 28, at 110.

[122] *See* INA § 240A(a). This bar for all aggravated felons was first implemented by the Antiterrorism and Effective Death Penalty Act of 1996. *See* Pub. L. No. 104–132, 110 Stat. 1214 (1996).

[123] *See supra* note 122.

aggravated felonies may actually serve little or no time, signaling that the criminal justice system does not in fact believe that these immigrants pose a real threat to society.[124]

The effects of the unqualified bar to relief for aggravated felons are exacerbated by changes to the definition of aggravated felony under the IIRIRA and other immigration and crime acts.[125] Once a brief list of the most serious and violent crimes,[126] the definition of aggravated felony now encompasses over twenty broad categories of crimes, some of which are only arguably serious or violent.[127] The IIRIRA did add such violent crimes as rape and sexual abuse of a minor to the list of aggravated felonies, but it also substantially lowered the sentence requirements and dollar amounts for many crimes that were already included.[128]

For example, a crime of violence or a theft offense, including receipt of stolen property, for which the sentence imposed is one year or longer, even if it is suspended, is now an aggravated felony.[129] Under this definition, to constitute a crime of violence, the nature of the crime must "ordinarily present a risk that physical force is used," regardless of whether the risk actually ensued.[130] Prior to the IIRIRA, crimes of theft or violence were not aggravated felonies unless a sentence of five years or more was imposed.[131] Crimes relating to tax evasion were not aggravated felonies unless the revenue loss to the Government exceeded $200,000; the IIRIRA reduced the amount to $10,000.[132]

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[124] To be deportable under INA § 237(a)(2)(A)(3) the non-citizen must have been *convicted* of an aggravated felony. As discussed *infra* note 135, a conviction does not require that the felon actually be incarcerated. *See* INA § 101(a)(48). Therefore, a felon with a suspended sentence may satisfy the definition of aggravated felony. *See id.*

[125] *See* Robert James McWhirter, *Hell Just Got Hotter: The Rings of Immigration Hell and the Immigration Consequences to Aliens Convicted of Crimes Revisited,* 11 GEO. IMMIGR. L.J. 507, 518 (1997). The term "aggravated felony" was first adopted in 1988 and encompassed particularly serious crimes such as murder and drug trafficking. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, §§ 7341, 7344, 102 Stat. 4181, 4469–71 (1988); *see also* McWhirter, *supra,* at 518. However, since then almost every immigration and crime act has expanded the list of crimes that are aggravated felonies. *See* McWhirter, *supra,* at 518.

[126] *See* McWhirter, *supra* note 125, at 518.

[127] *See* INA § 101(a)(43).

[128] *See* Daniel Kanstroom, *Immigration Consequences of Criminal Procedures, in* MASSACHUSETTS CRIMINAL PRACTICE 485, 507 (Eric D. Blumenson et al. eds., 1998).

[129] *See* INA § 101(a)(43)(F).

[130] *See* Kanstroom, *supra* note 128, at 505 n.82. The sentence requirement must also be met. *See* INA § 101(a)(43)(F).

[131] *See* Kanstroom, *supra* note 128, at 505.

[132] *See id.* at 506.

In addition to expanding the aggravated felony definition, the IIRIRA amended the aggravated felony definition so that it applies retroactively.[133] The IIRIRA stated that the amendments "shall apply to actions taken on or after the date of the enactment of this Act, regardless of when the conviction occurred. . . ."[134] Thus, at the time of conviction, the crime may not have been an aggravated felony, yet today it could be classified as such and may render an immigrant deportable regardless of the amount of time that has passed since the conviction.[135]

This retroactivity provision substantially affects the liberty interest of immigrants. An immigrant may build his life in the United States in reliance on the fact that a plea he agreed to in criminal court would not render him deportable.[136] The changes to the aggravated felony definition further affect the private interest of the immigrant because once he is deported on an aggravated felony conviction, he is barred from ever reentering the United States.[137] Deportation alone is a serious deprivation of liberty; however, without hope of return, the consequences are even more severe.

The changes made to the INA have significantly affected the outcomes of deportation proceedings.[138] One commentator describes the deportation process: prior to the enactment of the IIRIRA, a noncitizen who committed a theft for which he was sentenced to serve one year may have been deportable for committing a crime of moral turpitude if it was committed within five years of his admission to the United States.[139] Even if he were deportable, he may have been eligible for relief under §212(c).[140] If he did not qualify for this waiver, the Immigration Judge could have granted him voluntary departure.[141]

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[133] *See* INA § 101(a)(43).

[134] *See id.*

[135] *See id.* It is important to note that a conviction includes a judgment of guilt as well as a situation in which:

(1) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted to sufficient facts to warrant a finding of guilt, and

(2) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

INA § 101(a)(48)(A).

Consequently, plea bargains, which may be designed to avoid deportation, can be "convictions" under the INA. *See id.*

[136] *See* Morawetz, *supra* note 28, at 110–11.

[137] *See* INA § 212(a)(9).

[138] *See* Morawetz, *supra* note 28, at 113.

[139] *See id.*

[140] *See supra* note 121 and accompanying text.

[141] *See supra* note 110.

Even in the event that he had been deported, he may have been able to return to the United States some time in the future.[142] Under the current law, the story is much shorter. The commission of a theft resulting in a one-year sentence would be an aggravated felony.[143] An immigrant would be deportable and would not be eligible for relief.[144] Furthermore, he would never be able to reenter the United States.[145]

In sum, the immigrant's liberty interest—the first factor weighed in the *Mathews* test—is exceptionally strong. Deportation has always been a serious deprivation of liberty for an immigrant who has come to the United States intending to live here permanently. Congress' recent amendments to the INA have broadened the range of crimes that renders an immigrant deportable and, at the same time, has curtailed forms of relief previously available.[146] In doing so, immigrants' liberty interests have been strengthened, thus triggering a greater need for procedural protection, particularly appointed counsel, to ensure that deportation proceedings meet the dictates of fundamental fairness.

II. Erroneous Deprivation of Liberty

Having established the significant liberty interest that is at stake in deportation proceedings, the *Mathews* test requires a determination of the likelihood of an erroneous deprivation of liberty.[147] The test considers the hearing procedures currently used and their success in preventing erroneous deprivations.[148] If the current procedural protections result in a considerable potential for erroneous deprivations of liberty, it is likely that they fail to ensure a fundamentally fair hearing.[149] However, the test also requires an evaluation of the probable value, if any, of additional or substitute procedural safeguards.[150] Thus, to show the need for appointed counsel for immigrants, the

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[142] *See* INA § 212(a)(9). Although non-citizens may be barred from re-entering the United States for up to 20 years, previously removed non-citizens who have not committed aggravated felonies may be admissible. *See id.*

[143] *See id.* § 101(a)(43)(G).

[144] *See id.*

[145] *See id.* § 212(a)(9).

[146] *See supra* notes 120–46 and accompanying text.

[147] *See* Mathews v. Eldridge, 424 U.S. 313, 335 (1976).

[148] *See id.*

[149] *See id.*

[150] *See id.*

analysis compares a hearing in which the immigrant is unrepresented to one in which the immigrant is represented by counsel.[151]

Before examining the nature of deportation proceedings and the procedural protections currently in place, it is important to note that several studies have indicated that representation in immigration proceedings does affect the outcome.[152] In 1998 and 1999, the then American Bar Association President, Philip Anderson, encouraged members of the bar to provide pro bono services to immigrants, particularly those in detention.[153] According to Anderson, "[l]awyers can make a difference."[154] In support of his contention, he writes, "Figures from the Government Accounting Office [(GAO)] show that asylum seekers with legal representation have three times the chance of being granted asylum as those without counsel."[155]

Historical evidence supports the GAO's findings. In 1961, Charles Gordon, then INS Regional Counsel for the Northwest Region, wrote that the "party [deportee] himself and the administrative process as well could benefit from greater participation by counsel."[156] He cited a 1931 study that revealed that representation in exclusion proceedings had a "marked effect" on the procedure and that "represented aliens prevailed in a far higher proportion of cases, since their counsel were much more effective in raising points of law, in questioning due process, in marshalling relevant evidence, and in advancing claims to United States citizenship."[157]

Neither the GAO findings referred to by Anderson, nor the report cited by Gordon speak directly to the effect of counsel on the outcome of deportation proceedings overall,[158] but these studies certainly suggest that assistance of counsel does help avoid erroneous deprivations of liberty. Admittedly, factors other than representation may have contributed to the results of these studies.[159] Nevertheless,

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[151] *See id.*

[152] *See* Philip P. Anderson, *In Defense of Detainees,* A.B.A. J., Mar. 1999, at 6; Gordon, *supra* note 39, at 878–79; *see also* Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform,* 29 CONN. L. REV. 1647, 1665–66 (1997); Catherine J. Ross, *Appointing Counsel in Civil Litigation,* 64 FORDHAM L. REV. 1571, 1572–73 (1996).

[153] *See* Anderson, *supra* note 152.

[154] *Id.*

[155] *Id.*

[156] Gordon, *supra* note 39, at 879.

[157] *Id.* at 878. The study cited by Gordon was 5 *Wickersham Commission Report* 85 (1931).

[158] *See* Anderson, *supra* note 153; Gordon, *supra* note 39, at 879.

[159] Margaret Taylor points out that the higher approval rate for asylum seekers with counsel may be attributed in part to factors other than representation. *See* Taylor, *supra*

the studies are particularly persuasive when the underlying reasons for the impact of counsel in exclusion and asylum are considered. As noted earlier, counsel in exclusion cases is necessary for raising issues of law, collecting and presenting evidence, and advancing citizenship claims.[160] Similar arguments have been made with regard to asylum cases,[161] and the premise extends to deportation proceedings in general. This Part will demonstrate how the attorney's ability to highlight legal issues and present evidence can affect the outcome of a deportation proceeding and thus lessen the chances of an erroneous deprivation of liberty.

A. *Complexity of the Law and Process*

Recognizing the complexity of immigration law and the deportation process is integral to evaluating the probable value of counsel in a deportation proceeding.[162] When the laws and procedures are complex, there is a greater need for counsel to ensure that a just outcome is reached.[163] Historically, immigration law has been recognized as complicated and confusing.[164] Even the courts have attested to this fact: one court described the INA as "second only to the Internal Revenue Code in complexity."[165]

A cursory review of the grounds of deportation provides initial evidence of the complex nature of the law.[166] For example, the INA breaks the grounds for deportation into six major categories.[167] Within these categories there are parts, subparts, exceptions, and

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note 152, at 1665 n.62. For example, asylum seekers who believe that they have a strong claim may be more likely to seek private counsel. *See id.* Also, pro bono programs often screen potential clients and offer representation only to those with the strongest claims. *See id.*

[160] *See* Gordon, *supra* note 39, at 878.

[161] Even before exclusion and deportation proceedings were integrated into removal proceedings, there were substantive similarities between the two processes. Some waivers were available to non-citizens subject to both grounds of deportation and exclusion. Also, many of the grounds of exclusion are similar to (or even the same as) the grounds for deportation. Furthermore, procedurally, these hearings were very similar.

[162] *See* Black, *supra* note 6, at 302. Black writes, "The ability of an individual to represent himself must always be measured against the complexity of the legal proceeding itself." *Id.*

[163] *See id.*

[164] *See* Pilcher, *supra* note 101, at 269 & n.1; Black, *supra* note 6, at 302.

[165] *See* Castro-Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1988) (citing ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 107 (1985)).

[166] *See generally* INA § 237.

[167] *See id.*

waivers. Almost all of these various provisions encompass several elements.[168]

To further complicate matters, the statutory language alone is far from self-explanatory. Statutory definitions, regulations, and case law must be consulted to give meaning to the provisions.[169] The criminal grounds for deportation provide a particularly convincing example of the difficult task facing a non-lawyer immigrant trying to understand the INA.[170] For instance, in articulating the criminal grounds for deportation, the INA uses the word "convicted."[171] Although typically associated with a "guilty" finding, for deportation purposes, convictions encompass dispositions other than "guilty."[172] The definition section of the INA must be consulted to determine whether a criminal disposition rendered an immigrant "convicted."[173]

Immigrants placed in deportation proceedings now must take careful notice of the aggravated felony provisions in the INA since Congress has broadened the definition of aggravated felony and applied it retroactively.[174] This task will be difficult for unrepresented immigrants, as the statute itself offers little guidance. Although the INA's definition of aggravated felony is a starting point, case law research is necessary.[175]

Admittedly, it is the IJ's responsibility to be knowledgeable of the current status of the law and to determine whether a particular conviction constitutes an aggravated felony.[176] In many cases, the application of the law will be straightforward. Over time, clear rules develop that are applied with little legal debate.[177] Yet, inevitably, as changes to

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[168] *See id.*

[169] *See id.* § 101.

[170] *See* INA § 237(a)(2).

[171] *See id.* For example, § 237(a)(2)(A)(iii) reads: "Any alien who is convicted of an aggravated felony at any time after admission is deportable."

[172] *See supra* note 136.

[173] *See id.*

[174] *See supra* notes 133–35 and accompanying text.

[175] *See* INA § 101 (a)(43). The definition of aggravated felony lists over twenty broad categories of crimes. *See id.* The statute does not indicate in detail which crimes among the numerous state and federal violations actually fit into these categories. *See id.*

[176] *See id.* § 240(c)(1)(A); 8 C.F.R. § 240.41(a).

[177] Case law has established definitions for many vague terms, such as "crime of moral turpitude," and the immigrant can generally rely on the IJ's proper application of the law. At least within each circuit, there are well-established lists of crimes that qualify as crimes of moral turpitude. Yet even within this long-standing category of crimes, there is debate when the Service labels, for the first time, a specific criminal violation a crime of moral turpitude or when a change is made to the elements of a particular crime.

the law are made, legal ambiguities will arise, and the application of law will be called into question.[178]

The passage of the IIRIRA has magnified this problem for the unrepresented immigrant.[179] Questions as to the precise meaning of statutory changes to the INA have arisen among both scholars and practitioners.[180] As a result, legal challenges to the Service's interpretation of the IIRIRA and the constitutionality of some provisions have ensued.[181]

Successful legal challenges have highlighted the increased potential for erroneous deprivations of liberty for unrepresented immigrants since unchallenged legal issues may result in unjust outcomes. A poignant example of the potential for erroneous deprivation of liberty was the recent challenge to the retroactive application of the changes to the eligibility for § 212(c) waivers.[182]

The IIRIRA's replacement of § 212(c) waivers with Cancellation of Removal denied relief to aggravated felons.[183] However, many immigrants who had committed aggravated felonies, as now defined, also had pending applications for § 212(c) relief when the eligibility standards were changed.[184] Upon the Attorney General's directive, the changes applied retroactively so that pending applications were dismissed and orders of deportation were executed.[185] In May, 1998, the First Circuit Court of Appeals sustained a challenge to the retroactive application of the changes to pending § 212(c) waiver applications in

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[178] *See* Taylor, *supra* note 152, at 1666.

[179] *See id.* Taylor points out that attorneys "focus attention on critical legal issues, such as questions of statutory interpretation (a function that is particularly important with the enactment of [the IIRIRA])." *Id.*

[180] *See generally* UNDERSTANDING THE NEW IMMIGRATION LAW: HOW THE LAW AFFECTS IMMIGRANTS AND ASYLUM SEEKERS (Iris D. Gomez et al. eds., 1997).

[181] *See infra* notes 182–87 and accompanying text. Another telling example of the uncertainty of the constitutionality of the INA is the mandatory detention provision. *See* INA § 236(c). As of September 30, 1999, 10 federal district courts had held that the provision is unconstitutional. *236(c) Scorecard,* 4 BENDER'S IMMIGR. BULL. 1146, 1146 (1999). In addition, 20 other district courts have found that the provision did not apply on statutory grounds. *See id.* at 1146–47.

[182] *See generally* Henderson v. INS, 157 F.3d 106 (2d Cir. 1998); Goncalves v. Reno, 144 F.3d 110 (1st Cir. 1998).

[183] *See* IIRIRA § 304.

[184] *See, e.g., Henderson,* 157 F.3d at 109–12.

[185] *See id.* (citing Matter of Soriano, Int. Dec. No. 3289, 1996 WL 426888 (Op. Att'y Gen. Feb. 21, 1997)).

Goncalves v. Reno.[186] The First Circuit held that pending applications should be adjudicated.[187]

Although counsel cannot ensure that the IJ will interpret and apply the INA properly and constitutionally, at a minimum, it allows the immigrant the opportunity to advance complex legal arguments which he would not be able to do pro se.[188] When sweeping changes are enacted, counsel is integral in helping to clarify legal ambiguities that threaten to erroneously deprive immigrants of their liberty.[189]

B. *Presentation and Procedure*

Not only can attorneys raise issues of law, but their expertise in presenting evidence, eliciting testimony, and challenging due process grounds in procedurally complex hearings can significantly affect the outcome of the deportation proceeding.[190] The *Aguilera-Enriquez* court failed to recognize the complexity of deportation proceedings in comparing them to probation revocation hearings.[191] Probation revocation proceedings are described as informal, non-adversarial, and flexible.[192] The same cannot be said of deportation proceedings.[193] Although neither the rules of evidence nor the Administrative Procedures Act (APA) rules for formal adjudications apply in deportation proceedings, these proceedings encompass many of the formalities of a trial.[194] For example, the proceedings are recorded, witnesses are given the oath, there is an opportunity for cross examination, and evidence is entered into the record.[195]

The Service is represented by counsel, indicating that the government perceives a need for counsel in deportation proceedings.[196] The Service trial attorney puts the unrepresented immigrant at a dis-

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[186] 144 F.3d at 113.

[187] *See id.* at 134.

[188] *See* Taylor, *supra* note 153, at 1666; Black, *supra* note 6, at 303 (noting that the "idea of seeking judicial review before the Circuit Courts of Appeals or by habeas corpus before the district judge, even if presented to the alien, will often be foreign to his experience").

[189] *See* Taylor, *supra* note 153, at 1666; Black, *supra* note 6, at 303.

[190] *See infra* Part III.B.

[191] *See* Aguilera-Enriquez v. INS, 516 F.2d 565, 568 (6th Cir. 1975). Admittedly, the court does not specifically compare the procedures in a probation revocation hearing with those in a deportation proceeding, but it does cite *Gagnon* and adopts the case-by-case approach to appointed counsel. *See id.* at 568.

[192] *See, e.g.*, Black, *supra* note 6, at 295–96.

[193] *See id.*

[194] *See* LEGOMSKI, *supra* note 23, at 540, 541.

[195] *See* INA § 240(b)(1).

[196] *See* 8 CFR § 240.2; Black, *supra* note 6, at 295–96.

advantage from the outset.[197] Professor Deborah Anker studied the role of Service trial attorneys in asylum cases.[198] She found that the trial attorney tended to attack the applicant's characteristics, focusing on "discover[ing] weaknesses in the asylum applicant's case by challenging the credibility of her testimony and written application."[199] In addition, the trial attorneys vigorously questioned the non-citizen in an attempt to point out inconsistencies in the testimony.[200]

As Anker discovered, the applicant's testimony and demeanor during the hearing impacts the IJ's perception of the claim.[201] IJ's often found that asylum applicants' testimony was "vague, unresponsive, and evasive."[202] Although Anker's study was limited to asylum cases, it seems likely that many immigrants in deportation proceedings would encounter similar "perception" problems, particularly when they seek discretionary relief or when the outcome of the case depends substantially on their own testimony.[203] In these cases, the immigrants would likely be subject to similar attack by the INS trial attorney.[204]

The Service's adversarial position is consistent with notions about the proper role of an attorney as advocate.[205] The adversarial system of law depends upon the zealous advocacy of an attorney on behalf of

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[197] *See* Haney, *supra* note 45, at 184.

[198] *See generally* Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment,* 19 N.Y.U. REV. L. & SOC. CHANGE 433 (1992). Professor Anker's study incorporated observations and data from 193 hearings in an Immigration Court "located in a major urban setting." *See id.* at 443 & n.31. Interviews were conducted with hearing participants, IJs throughout the country, and other Justice Department officials. *See id.* at 443 n.32.

[199] *See id.* at 489.

[200] *See id.*

[201] *See id.* at 515.

[202] *See id.* at 521.

[203] For example, relief such as voluntary departure and cancellation of removal are discretionary forms of relief. *See* INA §§ 240A, B (stating that the Attorney General "may" order relief). Thus, in addition to showing that he is statutorily eligible, an immigrant must show that he merits such relief. *See id.* Although the Board of Immigration Appeals has outlined factors that should be taken into consideration when exercising discretionary powers, the IJ's subjective judgment of the immigrant's character will undoubtedly determine the outcome. *See* Anker, *supra* note 198, at 515.

[204] *See* Anker, *supra* note 198, at 494.

[205] Both the ABA Model Rules of Professional Conduct and ABA Model Code of Professional Responsibility require that an attorney zealously represent his clients. *See* MODEL RULES OF PROFESSIONAL CONDUCT Preamble, Scope, and Terminology (1997); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1983).

his client.[206] However, unlike the judiciary, agency adjudicators generally do not rely so strictly on the adversarial model.[207]

Historically, Immigration Judges have served the combined function of prosecutor and adjudicator.[208] Through 1950, IJs, then working within the service, would conduct hearings and investigate deportation cases.[209] After 1950, the Immigration Judges were no longer assigned to conduct investigations.[210] They have, however, continued to play an active role in the hearings.[211] According to the INA, the IJ shall "interrogate, examine, and cross-examine the alien and any witnesses."[212] Although this judicial activism can be neutral,[213] in some situations, an unrepresented immigrant may feel as though he is being prosecuted by two attorneys rather than one.[214]

With regard to asylum cases, Anker found that IJs do sometimes affirmatively assist the applicants.[215] Yet, for the most part, it appears that the goal of the IJs' interrogations is to test the applicant's credibility.[216] Supposed neutrality of the Immigration Judge is thus thrown into question and an immigrant's response is undoubtedly effected.[217]

Thus, although the independence of the IJs has been an important step in protecting the liberty interests at stake in deportation proceedings, the retention of the IJ's inquisitorial role has resulted in

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[206] *See* MODEL RULES OF PROFESSIONAL CONDUCT Preamble, Scope, and Terminology; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101.

[207] *See, e.g.* INA § 240(b)(1) (granting IJ authority to interrogate, examine, and cross-examine the non-citizen and any witnesses).

[208] *See* Rawitz, *supra* note 41, at 454–55.

[209] *See id.* at 454. When they were investigating cases, they were called "examining officers," and when they were conducting a hearing, they were called "presiding inspectors." *Id.* Although the presiding inspector could not also conduct a hearing on a case he had investigated unless the alien consented, he could conduct hearings on cases similar to those he had investigated. *See id.*

[210] However, it was not until 1983 that IJs officially separated from the Service. *See* Daniel Kanstroom, *Hello Darkness: Involuntary Testimony and Silence as Evidence in Deportation Proceedings*, 4 GEO. IMMIGR. L.J. 599, 620 (1990).

[211] *See id.* at 619; Anker, *supra* note 198, at 496.

[212] INA § 240(b)(1).

[213] With regard to IJ's questions in asylum cases, Anker writes that "judicial activism can operate neutrally: a judge can ask questions which both test the veracity of applicant's testimony and also assist her in developing facts which help establish her claim." Anker, *supra* note 198, at 496.

[214] *See id.* at 489. Anker observed that "the perception arose in many cases that applicants faced two, instead of one, opposing counsels." *Id.*

[215] *See id.* at 496.

[216] *See id.* at 498–99.

[217] With regard to many discretionary decisions, the IJ's perception can be determinative. *See* Anker, *supra* note 198, at 515.

perhaps the worst of both worlds for the unrepresented immigrant.[218] Without counsel an immigrant may be unable to "conserve the advantages of formality;" at the same time he is being subjected to interrogation by the IJ and other informalities that call into question the fairness of the hearing.[219] Regardless of the legitimacy of an immigrant's claim or defense, his attempt to present, without counsel, a well-developed defense to deportation may be futile.[220]

Part of this problem stems from the circumstances of the hearings themselves. Testifying in a deportation proceeding can be frustrating and intimidating.[221] One experienced trial attorney described the mindset of a witness in a jury trial:

> [M]ost witnesses other than experts or police officers have had no experience in telling their story in court, under oath, before judge and jury, knowing that some nasty lawyer for the other side is going to take shots at them in an attempt to destroy their credibility.
>
> The significance of testifying in a courtroom under these circumstances is not lost on witnesses. They are apt to do strange things. They may become frightened, animated, profane, or quiet. They may sulk or exult. They may become snide, sarcastic, and mean—or too agreeable, pliable, and compromising.[222]

Similarly, testifying in immigration court during a deportation proceeding can induce this same reaction from an immigrant or from other witnesses on his behalf.[223] The gravity of the situation undoubtedly makes the immigrant more nervous. Furthermore, the immigrant in deportation proceedings may find himself in a unique situation in comparison to parties in other civil hearings; many immigrants face language barriers and a "lack of familiarity with [U.S.] institutions," both of which exacerbate the apparent complexity of the pro-

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[218] *See* Black, *supra* note 6, at 303.

[219] *See id.*

[220] *See id.*

[221] *See* David H. Williams, *What to Do When Your Witness Goes Haywire: Getting the Direct Examination Back on Track*, TRIAL, May 1993, at 118, 118.

[222] *Id.*

[223] *See* Anker, *supra* note 198, at 527. Anker points out that asylum applicants are "often overwhelmed by the unfamiliar and confusing atmosphere of the proceeding." *Id.*

ceedings.[224] This context must be taken into account when evaluating the potential for erroneous deprivations of liberty.[225]

Counsel's thorough preparation and careful guidance throughout the hearing can counter some of the immigrant's natural reactions which may prove damaging to his case.[226] Counsel's employment of standard witness preparation techniques can lessen the chance that the client will damage his case through testimony, and, instead, it can help the client to bolster his claims.[227] These techniques include reviewing his testimony with him prior to the hearing, instructing him to remain calm, encouraging him to listen to the question and to answer it completely and clearly, having him ask for a question to be repeated if it is unclear, informing him to remain silent if a question is objected to, and reminding him that expressions of emotion are not inappropriate as long as they do not show disrespect for the IJ or the proceeding.[228]

Through direct examination, an attorney can remind the client of facts he may forget to relay if left to tell his story on his own.[229] Counsel can also prepare the client for cross-examination.[230] By reviewing the theory of the case and speculating as to what arguments and evidence the INS attorney will attack, counsel can best advise his client of what to expect.[231] Counsel can also advise his client to answer questions with factually correct statements because "the witness should avoid trying to determine what the 'best' answer is."[232]

Perhaps most importantly, because counsel knows what factors the IJ will consider in making his decision, counsel is able to elicit testimony and present evidence that will best support the immigrant's claim.[233] For example, if an immigrant applies for Cancellation of Removal, the IJ will consider the following factors in making a decision to exercise his discretionary authority: family ties with the United States, residence of long duration in the country (particularly when the inception of residence occurred while the respondent was at a

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[224] *See id.*; Black, *supra* note 6, at 301.

[225] *See Anker, supra* note 198, at 527; Black, *supra* note 6, at 301.

[226] *See* Williams, *supra* note 221, at 121.

[227] *See* BILL ONG HING ET AL., WINNING 212(C) CASES § 8.4 (Supp. 1994).

[228] *See id.* at § 8.5.

[229] *See supra* note 224.

[230] *See* HING, *supra* note 227, at § 8.7.

[231] *See id.*

[232] *See id.*

[233] Likewise, counsel is in a better position to make procedural objections throughout the hearing. *See* Gordon, *supra* note 39, at 878.

young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's armed forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (e.g., affidavits from family, friends, and responsible community representatives).[234] It is unlikely that many of these factors will be obvious to an unrepresented immigrant. Although some of these factors can be proven without advance preparation, establishing other factors requires investigation and preparation.[235] When possible, affidavits, letters, and documentation should be offered as proof.[236] Counsel plays an important role in guiding an immigrant through the process of collecting documentation.[237]

While many of the procedural protections currently do little to guard against erroneous outcomes for unrepresented immigrants, one potentially beneficial procedural safeguard is the requirement that the IJ advise the immigrant as to any forms of relief for which he may be eligible.[238] The Ninth Circuit has recognized that this requirement places a "significant burden" on the IJ.[239] Upon review of the record, the IJ must advise the non-citizen of any reasonable possibilities of relief and give him the opportunity to develop his claim for such relief.[240]

However, even the Ninth Circuit Court of Appeals has acknowledged the limitations to this safeguard.[241] In *Moran-Enriquez,* the court

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[234] *See In re* C-V-T, Int. Dec. 3342, 1998 BIA LEXIS 11, at *10–11 (BIA Feb. 12, 1998) (citing Matter of Marin, 16 I&N Dec. 581, 584–85 (BIA 1978)).

[235] *See infra* notes 236–37.

[236] *See* HING, *supra* note 227, at § 8.2. For example, in establishing rehabilitation, letters and evaluations from experts should be submitted as well as favorable parole or probation reports, evidence of academic achievement, and awards for community service or excellent job performance. *See id.*

[237] *See id.* Counsel is particularly helpful where the non-citizen is detained by the Service under INA § 236 and, thus, less able to collect documentation.

[238] *See* 8 C.F.R. § 240.11(a)(2) ("The Immigration Judge shall inform the alien of his of her apparent eligibility to apply for any of the benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing.").

[239] *See* Moran-Enriquez v. INS, 884 F.2d 420, 423 (9th Cir. 1989). The petitioner claimed that he was eligible for relief, although he was unaware of this fact at his deportation proceeding because the IJ failed to advise him about his apparent eligibility. *See id.* at 422. The Court of Appeals found that the record indicated, by inference, that petitioner may be eligible for relief. *See id.* Under these circumstances, the IJ was required to inquire further into petitioner's circumstances to find out if he was eligible. *See id.* at 423.

[240] *See id.*

[241] *See id.* at 422.

held that "IJs are not expected to be clairvoyant; the record before them must fairly raise the issue."[242] Therefore, an IJ has no responsibility to advise a non-citizen about forms of relief unless the record indicates that he may be eligible.[243] Although the record established by an unrepresented immigrant may be sufficient to trigger the IJ's responsibility,[244] in some cases it will not.[245] Without the assistance of counsel to help build the record, to determine relevant facts, or to discern circumstances that indicate that the non-citizen is eligible for relief, an unrepresented immigrant will likely be unable to present his case fully and persuasively during a deportation hearing.[246]

Furthermore, even if the IJ advises the non-citizen of the possibility of relief, there is no assurance that an eligible immigrant will be granted relief. First, cultural factors or fear of unknown consequences may prevent an immigrant from sharing personal, and perhaps painful, information with the IJ.[247] Counsel, however, is in a better position to determine if his client is eligible: an attorney is more clearly "on his side" and over time can develop a trusting relationship that will facilitate this sharing of information.[248] Second, as discussed previously, even if the IJ advises the immigrant about the possibility of relief, counsel is needed to help gather and present supporting evidence.[249]

Finally, according to the court in *Aguilera-Enriquez*, the case-by-case approach to appointed counsel provides additional procedural protection: If as a result of appearing unrepresented, an indigent immigrant is found deportable, the courts appoint counsel and re-

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[242] *Id.*

[243] *See id.* ("Until the [alien] himself or some other person puts information before the judge that makes such eligibility 'apparent,' this duty does not come into play.") (quoting Bu Roe v. INS, 771 F.2d 1328, 1334 (9th Cir. 1985)).

[244] *Moran-Enriquez* illustrates this point. The petitioner had been admitted to the United States on a visa available to immediate relatives of US citizens. *See Moran-Enriquez*, 884 F.2d at 421. Based on this fact, the Immigration Judge should have explored the possibility that the petitioner was eligible for § 212(h), which was available for immediate relatives. *See id.* at 422.

[245] *See infra* notes 255–56 and accompanying text.

[246] *See id.*

[247] This practitioner's manual spends a whole section stressing the importance of building the relationship with the client and describing methods that will allow the relationship to develop. *See id.* at § 5. The book emphasizes the need to meet with the client numerous times both to build trust and to gather more information that will better support the case. *See id.* at § 5.2. Consequently, it is unrealistic to expect an IJ to serve as an adequate substitute.

[248] *See* HING, *supra* note 227, at § 8.

[249] *See supra* notes 235–37 and accompanying text.

commence the proceedings.[250] The *Aguilera-Enriquez* decision suggests that a court's review of the record to determine if counsel was needed will prevent erroneous deprivations of liberty and ensure the guarantees of due process.[251] However, this reasoning falls short of meeting the dictates of due process.

First, it presumes that an immigrant who was unrepresented in his hearing will now be able to proceed in federal court. Second, assuming he knows to raise the issue of appointed counsel before a district court judge, the court will review only the record that was made without the assistance of counsel.[252] This record will reflect all of the problems of self-representation that have been discussed previously and, thus, in most cases, will not be of assistance to the court in determining how counsel could have affected the outcome of the case.[253] As the dissent in *Aguilera-Enriquez* pointed out, relevant information that may have affected the outcome of the proceeding will be missing from the record; the court cannot possibly speculate as to what evidence may have been brought forth by counsel.[254]

Consequently, the case-by-case approach does not provide sufficient protection against the erroneous deprivations of liberty which inherently result when immigrants are unrepresented in deportation proceedings. The promise of counsel for all indigent immigrants will, at a minimum, help the immigrant to understand the charges against him and help him to understand the hearing process; ensure that there is some investigation into possible defenses and forms of relief and that the immigrant is prepared to testify and present supporting evidence; and explore the possible legal challenges to the applicable provisions. This step will provide a necessary safeguard against erroneous deprivations of liberty.

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[250] *See* 516 F.2d 565, 569 (6th Cir. 1975).

[251] *See id.* at 568–69.

[252] *See id.* at 569.

[253] *See id.* at 573 (DeMascio, J., dissenting) (stating that the majority's approach "second guess[es] the record, a record made without petitioner's meaningful participation" and that the court should not "speculate at this stage what contentions appointed counsel could have raised before the immigration judge").

[254] *See id.* Furthermore, the court rejected the notion that even in cases that appear to be clear cut—for example, a conviction for an aggravated felony (rendering an immigrant deportable and ineligible for relief)—the assistance of an attorney may reveal that the case is not so clear. *See id.* at 569. Although *Aguilera-Enriquez* held that the Service is not required "to conduct an inquiry into each potential deportee's criminal record to ascertain whether a post-conviction motion is likely to overturn his conviction," post-conviction relief may be a viable option for some immigrants. *See id.* at 571.

CONCLUSION

Although courts have rejected claims for a per se right to appointed counsel in deportation proceedings, the time has come to recognize that the promise of fundamental fairness—the touchstone of due process—cannot be fulfilled without counsel. The IIRIRA and other changes to the INA have made this painfully obvious.[255] The severity of the new INA puts many immigrants, some of whom previously had no fear of deportation, in potential jeopardy of being forced to leave their lives in the United States—maybe the only lives they have ever known.

With such a significant liberty interest at stake, the protections against erroneous deprivations of liberty take on great importance.[256] However, the case-by-case approach to appointed counsel does not adequately prevent erroneous outcomes, particularly since legal challenges and knowledge of the law can make the difference between remaining in the United States and being forced to leave, perhaps forever.[257] The foregoing assessment of the *Mathews* test factors—first, establishing a significant liberty interest and, second, the likelihood of its erroneous deprivation—supports the claim that due process requires appointed counsel for all indigent immigrants.

On the other side of this equation is the government's interest in not providing counsel. Undoubtedly, there will be a financial burden. But can that interest really outweigh the interests facing immigrants? The government has an even stronger interest: ensuring that constitutional provisions are satisfied. Due process requires the utmost protection when the most important interests are at stake. Appointed counsel for immigrants in deportation proceedings is an essential element of that protection.

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[255] *See supra* Part II.B.
[256] *See supra* Part II.A.
[257] *See supra* Part III.